

P R O C E E D I N G S

THE CLERK: Case No. 03-1431, AT&T Corporation,
petitioner, versus Federal Communications Commission, et
al. Mr. Carpenter for the petitioner, Mr. Bourne for the
respondents.

ORAL ARGUMENT OF DAVID W. CARPENTER, ESQ.

ON BEHALF OF THE PETITIONER

MR. CARPENTER: May it please the Court. With
your permission, I'd like to save four minutes for
rebuttal.

AT&T is appealing from an FCC declaratory order that
didn't give effect to the plain terms of AT&T's tariff
that allowed the transfer or assignment of telephone
service only if certain conditions are met. A service
transfer assignment is simply a change in the customer of
record.

JUDGE GINSBURG: Mr. Carpenter, I'm sorry, there
are so many terminological ambiguities in this case, I'm
going to have to ask you, if I'm going to understand
anything you say, to explain a couple of the terms that
you've already used. What is a service in this tariff?

MR. CARPENTER: What is a service?

JUDGE GINSBURG: Yes. It says, 2.1.8 talks

1 about WATS, Wide Area Telephone Service, right?

2 MR. CARPENTER: Right.

3 JUDGE GINSBURG: May be transferred or assigned,
4 okay? And then there are, you just used the term
5 "service," I believe, in terms of increasing and
6 decreasing service, is that correct?

7 MR. CARPENTER: No, I used, I talked about, I
8 talk about what a transfer or assignment is. It's simply
9 changing the customer of record for a service.

10 JUDGE GINSBURG: Okay, but the transfer or
11 assignment of what?

12 MR. CARPENTER: Of WATS service.

13 JUDGE GINSBURG: Of service?

14 MR. CARPENTER: Yes.

15 JUDGE GINSBURG: What is a WATS service?

16 MR. CARPENTER: WATS service is an arrangement
17 that allows in the case of 800 service, that delivers a
18 call to your location when an 800 number is called.

19 JUDGE GINSBURG: Well, you just said in the case
20 of 800 service --

21 MR. CARPENTER: 800 service.

22 JUDGE GINSBURG: -- so there are other WATS?

23 MR. CARPENTER: There's an outbound WATS
24 service. It's simply another discounted long distance
25 service. This case involves inbound WATS service, which

1 MR. CARPENTER: I don't know how much time
2 you're going to give me for rebuttal, but I --

3 JUDGE GINSBURG: Well, I want to ask you
4 something yet. At 493 and other pages in the JA, there's
5 a transfer of service agreement and notification form.
6 Now, the use of the word service in that heading, transfer
7 of service, is clearly not the transfer of one, it's not a
8 change from 800 domestic to 800 Mexico, it exemplifies
9 what you said, a different meaning. But look at the
10 paragraph that begins services are not to be interrupted
11 or relocated at the time --

12 MR. CARPENTER: Yes.

13 JUDGE GINSBURG: -- transfer or assignment is
14 made. If a change of service is a change of location, how
15 can it say that services are not to be relocated?

16 MR. CARPENTER: A change of service is not a
17 change of location.

18 JUDGE GINSBURG: Well, I thought you were
19 telling me earlier --

20 MR. CARPENTER: A transfer of service is not a
21 transfer of location.

22 JUDGE GINSBURG: Okay.

23 MR. CARPENTER: A transfer of service is just
24 the "change in the customer of record" that's entitled to
25 have calls delivered to a location. That's all a

1 transfer, it's, you know, it says transfer or assignment.

2 JUDGE GINSBURG: Ah, okay, okay.

3 MR. CARPENTER: Okay?

4 JUDGE GINSBURG: All right. Okay. All right,
5 that makes sense. All right, did you have another point
6 you wanted to make?

7 MR. CARPENTER: Well, I had lots of points, but
8 I don't know how much time you're going to give me.

9 JUDGE GINSBURG: Well, it depends upon the
10 quality of the next point.

11 MR. CARPENTER: Well, you know, I think, I just,
12 I think I probably covered the basic points in the
13 response to the questions.

14 JUDGE GINSBURG: That's fine.

15 MR. CARPENTER: If you'll give me time on
16 rebuttal, that will, I think, be sufficient.

17 JUDGE GINSBURG: Yes, we will. Yes, we will.
18 Thank you, Mr. Carpenter.

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20 ORAL ARGUMENT OF LAURENCE N. BOURNE, ESQ.

21 ON BEHALF OF THE RESPONDENTS

22

23 MR. BOURNE: May it please the Court. My name
24 is Nick Bourne, and I'm here representing the Federal
25 Communications Commission.

1 JUDGE TATEL: That that's not what you said?

2 MR. CARPENTER: What we said, Your Honor, we did
3 not construe 2.1 to apply only to plans. What we said in
4 the sentence they're quoting out of context is that the
5 tariff requires the transfer of service only when the
6 obligations are assumed. We said that in this case, the
7 relevant service are the CSTP plans. That's because in
8 this case what they transferred was the plans, all the
9 locations, without the liabilities. And we said in that
10 very sentence, in that very paragraph repeatedly that what
11 CCI wanted to do violated the tariff because they were
12 transferring the traffic only and they weren't
13 transferring the obligations. There's no way on earth
14 that we were conceding away the only issue in this case
15 with that parenthetical phrase that they're lifting out of
16 context. In fact, the FCC order says in the very
17 paragraph, quote, AT&T's position throughout this
18 proceeding is, quote, 2.1.8 of the tariff did not
19 authorize the transfer of traffic without a plan unless
20 the transferee assumed the original customer's liability.
21 So the order says what our position was below. We did not
22 concede away the only issue in the case, and the argument
23 that they're making is based on a parenthetical that
24 they're lifting out of context and then misstating.

25 JUDGE GINSBURG: Mr. Carpenter --

1 as I pointed out before, the FCC acknowledged in its order
2 what our position was, that you can't transfer this
3 service without transferring the obligations, they say
4 that in the very first sentence in paragraph 9. What
5 they're relying on on JA 249 is, I think has been
6 virtually conceded. You know, it isn't construing the
7 tariff in a different way than we are arguing that it be
8 construed in this Court. It's not like the Verizon case
9 that they cited in that letter, where we construed it one
10 way and, or where the petitioner construed the language
11 one way below and then in an inconsistent way here. We
12 considered it the same way here that we're construing it
13 now, and all we're pointing out that the relevant services
14 in this case are the CSTEP plans.

15 I just want to also underscore that the only
16 explanation for the failure to comply with the explicit
17 conditions in this tariff is that they were trying to
18 evade or at least diminish our ability to collect these
19 shortfall charges. PSE, there's no problem at all with
20 resellers moving traffic from higher-priced plans to
21 lower-priced plans. Long distance prices have been going
22 down consistently since World War II, and resellers were
23 always moving from high-priced to lower-priced plans,
24 aggregating more and more traffic on lower-priced plans.
25 But to do that, the volume commitments that were the quid

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5185

COMBINED CO, INC., a Florida corporation;
WINBACK & CONSERVE PROGRAM, INC.,
ONE STOP FIN INC.; 800 DISCOUNTS INC.,
New Jersey corporations; GROUP DISCOUNTS, INC.

Plaintiffs-Appellees

v.

AT&T CORP, a New York corporation,

Defendant-Appellant

On Appeal from the
United States District Court
for the District of New Jersey

REPLY BRIEF OF APPELLANT AT&T CORP.

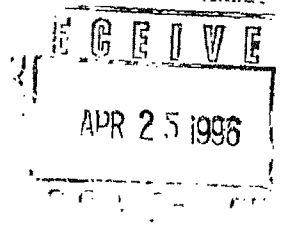
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to describe the proposed transfer of a plan without its liabilities and then asked whether AT&T's tariff prohibits "fractionalization."

The District Court asked and answered the wrong questions. First, the threshold question is whether a transfer of all a plan's traffic without its liabilities is permitted by the Tariff's Transfer Provision (Section 2.1.8), and, as AT&T's opening brief explains, the answer is that the tariff allows transfers only if the "new customer" (PSE) assumes "all" of the old customer's (here, CCI's) obligations, which obviously include shortfall and termination commitments when all the plan's traffic is transferred. See AT&T Br. at 26-27.

The Inga Brief offers no response to this point. The CCI Brief, by contrast, has offered arguments that were not accepted by the District Court, but that confirm the District Court's error. CCI notes that a transfer of service can apply either to individual end user locations or to entire plans. See CCI Br. at 31-32 & n.13. CCI then, incongruously, seeks to defend the District Court by citing "record evidence" that addressed transfers of individual end user locations (not entire plan's liabilities), and showed that the only "obligation" transferred to the "new customer" in that event is the unpaid liability associated with the individual end user location that is transferred.

But that is self-evident under the tariff. By contrast, when all the plan's traffic and locations are being transferred to a new customer and when the "plan" would then exist only as an empty shell, then the "new customer" would not be assuming "all" the associated "obligations" unless it assumed the "existing customer's" shortfall and termination commitments.